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10/700,776	11/04/2003	Nanda Christine Almond	9419	5520

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EXAMINER

REICHLE, KARIN M

ART UNIT	PAPER NUMBER
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3761

DATE MAILED: 10/19/2005

Please find below and/or attached an Office communication concerning this application or proceeding.



## DETAILED ACTION

### *Specification*

### *Drawings*

1. The drawings were received on 3-18-04. These drawings are not accepted by the Examiner, see following paragraphs.

2. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the densities as claimed in claims 1, and 7-11, the shape as claimed in claim 6, the applicator as claimed in claims 12-14 and the wrapper as claimed in claims 15-16 must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will

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be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### ***Description***

3. The abstract of the disclosure is objected to because on line 2, “,” should be deleted. On line 4, “;” (both) should be --,--. On lines 5-6, “Also,...insertion end region.” is redundant. Correction is required. See MPEP § 608.01(b).

4. The disclosure is objected to because of the following informalities: With respect to page 2, line 1 and page 2, lines 5-6 see the discussion of the abstract supra. Lines 9-10, i.e. “located...density.”, are also redundant. The Summary of the Invention section, i.e. a description of the claimed invention, and the invention of the claims is not commensurate, see MPEP 608.01(d). The description on page 4, line 5-page 4, line 12, i.e. a tampon is insertable in body cavities also, is inconsistent with that on page 4, lines 12-14, page 5, lines 3-4, page 6, lines 3-5, i.e. describes structure of the tampon with regard to only the vaginal canal. The description on page 8, line 12, i.e. “about”, is inconsistent with that on page 7, lines 16-17.

Appropriate correction is required.

### ***Claim Objections***

5. Claims 1-16 are objected to because of the following informalities: in claim 1, line 1, “,” should be deleted. On line 5, “opposite...region” is redundant, see Claim Language Interpretation section infra. In claim 14, line 5, after “observe”, --a profile of-- should be inserted. Appropriate correction is required.

***Claim Rejections - 35 USC § 112***

6. Claims 12-16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 12-16 are unclear since the tampon is described as including further structure, i.e. structure which is part of the tampon, but then describes such structure as housing the tampon or wrapping the tampon on the outer surface of the tampon, i.e. how can something house itself or wrap itself, e.g. in claim 12, line 1, should “tampon” be --absorbent material--?

***Claim Language Interpretation***

7. The claim language is interpreted in light of the definitions on page 4, line 5-page 7, line 19, page 13, lines 25-29 and page 14, lines 16-19, as best understood, see discussion in paragraphs supra.

***Claim Rejections - 35 USC § 102***

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

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9. Claims 1-5, 7, 8 and 16 are rejected under 35 U.S.C. 102(b) as being anticipated by Hennig '009.

Claims 1, 7 and 8: See Hennig at Figures, title, col. 2, lines 29-35 and 54-56, col. 3, lines 14-32, and 41-43, col. 4, lines 21-31 and 38-41 and the Claim Language Interpretation section *supra*, the tampon, 10, 10', 10'', has a longitudinal centerline, a cross-sectional area orthogonal thereto, is a mass of absorbent material formed into a self sustaining shape having a surface which is substantially serpentine and has an insertion end region adjacent 12, a central region 16 and a withdrawal end region 14 adjacent 34 which has a fiber density greater than the center region fiber density and about equal to the insertion end fiber density. The maximum perimeter region of the insertion end region has an average fiber density, see 14 adjacent 12, greater than the center region minimum perimeter region average fiber density. With regard to claims 2-5, see the cited portions and the Figures and note that it is not claimed how the regions flare or taper, e.g. toward the center region or away therefrom, i.e. a region which flares toward the center region also tapers away from such center region. With regard to claim 16, see col. 4, lines 27-31 for example.

10. Claims 1-16 are rejected under 35 U.S.C. 102(e) as being anticipated by Randall et al '536 or Kollwitz et al '805.

The applied reference has a common assignee and inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived

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from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

With respect to Randall et al '536, claims 1, and 6-16: see Figures, col. 2, line 18-col. 4, line 43, col. 6, lines 65-66, col. 7, lines 10-57, col. 8, lines 42-48 and col. 9, lines 22-24 and claims 1-3, 5-8, 15, and 17-19, i.e. the insertion end is 24, the withdrawal end is 30 and the center region is 32. With regard to claims 2-5, see the cited portions and the Figures and note again that it is not claimed how the regions flare or taper, e.g. toward the center region or away therefrom, i.e. a region which flares toward the center region also tapers away from such center region.

With respect to Kollwitz et al '805, claims 1 and 6-16: see Figures, col. 2, line 18-col. 4, line 32, col. 6, lines 14-15, col. 6, line 63-col. 7, line 6, col. 7, lines 56-62 and col. 9, lines 35-37 and claims 1-2, 4-7, 14, and 16-19, i.e. the insertion end is 24, the withdrawal end is 30 and the center region is 32. With regard to claims 2-5, see the cited portions and the Figures and note again that it is not claimed how the regions flare or taper, e.g. toward the center region or away therefrom, i.e. a region which flares toward the center region also tapers away from such center region.

### ***Claim Rejections - 35 USC § 103***

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

12. Claims 6, and 9-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hennig '009.

With regard to claim 6, Applicant claims the withdrawal end being asymmetric about the longitudinal centerline of the tampon but does not disclose any significance to such shape. Also, see, e.g., col. 4, lines 27-31 of Hennig. Therefore, it would have been an obvious matter of design choice to employ a shape of the withdrawal end which is asymmetric about the longitudinal centerline, e.g. asymmetric texturing, if not already, since such a modification would have involved a mere change in the form or shape of a component. A change in form or shape is generally recognized as being within the level of ordinary skill in the art. In re Dailey, 149 USPQ 47 (CCPA 1976).

With regard to claims 9-10, Applicant claims the range of the fiber density of the withdrawal end or insertion end region maximum perimeter region average fiber density as compared to that of the center region or center region minimum perimeter region, respectively. Applicant does not disclose the significance of such ranges and Hennig discloses that the densities of the end regions are greater than those of the center region, i.e. the same general conditions of the claim. Where the general conditions of the claim are disclosed by the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation, see In re Aller, 105 USPQ 233.

13. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hennig '009 in view of Child et al '952.

In addition to the density relationship taught by Hennig Applicant claims the regions being a cotton and rayon blend which Hennig does not teach. Hennig does teach the desire to be



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formed of a cellulose based material of the type well known for catamenial tampons. Also see Child at col. 3, lines 53-65, i.e. well known catamenial tampon cellulose based materials include cotton and rayon blends. Therefore, to make the cellulose based material of Hennig a cotton rayon blend as taught by Child would be obvious to one of ordinary skill in the art in view of the recognition that such is a well known catamenial tampon cellulose based material and the desire of Hennig to employ such a material.

14. Claims 12-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hennig in view of Bletzinger '422.

Applicant claims an applicator for housing the tampon which applicator is at least partially translucent or comprised of flexible material which conforms to the outer surface of the tampon which allows the user to observe the profile of the outer surface or a wrapper which tightly conforming. Hennig does not teach such applicator or wrapper but does teach a cellulose based tampon intended for insertion in a body opening. Furthermore see Bletzinger '422 at the Figures, col. 1, lines 15-21, 56-62 and 69-71, col. 2, lines 10-26 and 55-58, col. 5, lines 21-28 and 58-61, i.e. combining a cellulose based tampon for insertion with a body opening with an applicator or wrapper as claimed for ease of insertion and to maintain the condition of the tampon until use. Therefore, to employ an applicator or wrapper as claimed in combination with the Hennig cellulose based tampon intended for insertion in a body opening would be obvious to one of ordinary skill in the art in view of the teachings of Bletzinger due to the recognition that such would enhance insertion and maintainence of the tampon condition until use and the desirability of such in any tampon. It is noted with respect to claim 15 that the wrapper of

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Bletzinger does not exceed the perimeter of the outer surface similar to outer surface 50 of the instant application more than 50%, i.e. is "tightly conforming".

### ***Double Patenting***

15. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

16. Claims 1-16 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-8 and 15-20 or claims 1-7 and 14-20 of U.S. Patent No. 6,824,536 or 6,932,805 in view of Hennig(claims 1-16) and Child (claim 11). Since this application was filed after the patents, the *In re Vogel* one way test applies, i.e. is the invention of the application obvious in view of the invention of the claims of the patent? The answer is yes. The claims of the application are both broader and narrower than the claims of the respective patent. Specifically the application claims do not require 1) the perimeters and volume as claimed in claim 1, claims 4-8 and the function as claimed in claim 20 of the '536 patent or the perimeters as claimed in claims 1, 3, 5-7 and 15 and the function as claimed in claim 20 of the '805 patent but do require 2) the fiber density relationships as claimed in claims 1 and 7-11 and the cotton rayon blend as claimed in claim 11 of the application. With regard to 1),

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in essence once the applicant has received a patent for a species or more specific embodiment he/she is not entitled to a patent for the generic or broader invention. This is because the more specific anticipates the broader. Thus the respective patent claims anticipate the application claims. See *In re Goodman*, supra. With regard to 2), see the cited portions of Hennig supra. To employ the claimed density pattern, i.e. combination of fiber density changes, as taught by Hennig would be obvious to one of ordinary skill in the art in view of the recognition that such shape reliably seats in a body opening in which it is inserted to absorb fluid therefrom and the desirability of such by the claimed tampon, see the definition of "tampon" in col. 2, lines 18-20 of '536 and '805, i.e. desire for insertion into a body cavity for absorption of fluid therefrom. With regard to claims 9-10, see the discussion in paragraph 12 supra which rationale, i.e. not inventive to discover optimum ranges, also applies here. With regard to claim 11, the claimed regions are claimed as being of a rayon and cotton blend which is not claimed by the claims of '536 or '805. However, again see the definition of tampon in the respective patent, i.e. "any absorbent structure" for insertion into body cavities including the vaginal canal. See the portions of Hennig and Child supra, i.e. absorbent structures for insertion into body cavities include cellulose based materials known for catamenial tampons which known materials include cotton rayon blends. Therefore, to make the absorbent structure of the respective patent "tampon" a cotton rayon blend as taught by Hennig and Child would be obvious to one of ordinary skill in the art in view of the recognition that such is a well known absorbent material for the structure of a "tampon" and the desire of the respective patent to employ such a structure.

17. Claims 1-6 and 8-16 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-17 of copending

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Application No. 10/770,775. Although the conflicting claims are not identical, they are not patentably distinct from each other because since this application was filed on the same day as the other application, the *In re Vogel* one way test applies, i.e. is the invention of claims of this application obvious in view of the invention of the claims of the other application? The answer is yes. The claims of the application are both broader and narrower than the claims of the other application. Specifically, 1) claims 1-6 and 8-16 of the instant application do not require the density of the withdrawal end region relative to the center but 2) do require the insertion end region density relative to the center in combination with the features of claims 2-6 and 13-16. With regard to 1), in essence once the applicant has received a patent for a species or more specific embodiment he/she is not entitled to a patent for the generic or broader invention. This is because the more specific anticipates the broader. Thus the other application claims, if patented, would anticipate the application claims. See *In re Goodman supra*. With regard to 2), see claim 7 of the other application. To also employ the fiber density relationship between the insertion end and the center region in combination with the other features claimed in claims 2-6 and 13-16 would have been obvious to one of ordinary skill in the art in view of the recognition that such would provide a denser insertion end enhancing the stability thereof, e.g. better prevention of breakup while being used during insertion and the desire in any tampon to be inserted without breakup.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

18. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v.*

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*Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

19. Claim 7 is provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claim 7 of copending Application No. 10/700,775. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

### ***Common Ownership***

20. Claims 1-16 are directed to an invention not patentably distinct from claims 1-8 and 15-20 and 1-7 and 14-20 of commonly assigned 6,824,536 and 6,932,805, respectively. Specifically, see double patenting rejections supra.

21. The U.S. Patent and Trademark Office normally will not institute an interference between applications or a patent and an application of common ownership (see MPEP § 2302). Commonly assigned '536 and '805, discussed above, would form the basis for a rejection of the noted claims under 35 U.S.C. 103(a) if the commonly assigned case qualifies as prior art under 35 U.S.C. 102(e), (f) or (g) and the conflicting inventions were not commonly owned at the time the invention in this application was made. In order for the examiner to resolve this issue, the assignee can, under 35 U.S.C. 103(c) and 37 CFR 1.78(c), either show that the conflicting inventions were commonly owned at the time the invention in this application was made, or name the prior inventor of the conflicting subject matter.

A showing that the inventions were commonly owned at the time the invention in this application was made will preclude a rejection under 35 U.S.C. 103(a) based upon the commonly

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assigned case as a reference under 35 U.S.C. 102(f) or (g), or 35 U.S.C. 102(e) for applications filed on or after November 29, 1999.


*Conclusion*

22. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The cited but not applied art also teaches tampons with various of the disclosed and/or claimed features.

23. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karin M. Reichle whose telephone number is (571) 272-4936. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tanya Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Karin M. Reichle  
Primary Examiner  
Art Unit 3761

KMR  
October 5, 2005